STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 217-4-16 Wncv

STATE OF VERMONT,	)
	)
THROUGH SUSAN L. DONEGAN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE VERMONT DEPARTMENT OF FINANCIAL REGULATION,	)
	)
and	)
	)
ATTORNEY GENERAL WILLIAM SORRELL,	)
	)
Plaintiffs,	)
v.	)
	)
ARIEL QUIROS; WILLIAM STENGER; Q RESORTS, INC.; JAY PEAK, INC.; JAY PEAK HOTEL SUITES L.P.; JAY PEAK HOTEL SUITES PHASE II L.P.; JAY PEAK MANAGEMENT, INC.; JAY PEAK PENTHOUSE SUITES L.P.; JAY PEAK GP SERVICES, INC.; JAY PEAK GOLF AND MOUNTAIN SUITES L.P.; JAY PEAK GP SERVICES GOLF, INC.; JAY PEAK LODGE AND TOWNHOUSES L.P.; JAY PEAK GP SERVICES LODGE, INC.; JAY PEAK SUITES STATESIDE L.P.; JAY PEAK GP SERVICES STATESIDE, INC.; JAY PEAK BIOMEDICAL RESEARCH PARK L.P.; and ANC BIO VERMONT GP SERVICES, LLC,	)
	)
Defendants.	)

DEFENDANT ARIEL QUIROS' REPLY IN SUPPORT OF MOTION TO DISMISS

As pleaded in the Complaint, the State's claims rest—unmistakably—on alleged misstatements that neither were directly made by Ariel Quiros nor satisfy the elements of securities fraud. Apparently recognizing those deficiencies, the State now back-pedals and

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attempts to recharacterize its case as one based on a "fraudulent scheme." It cannot do so, for several reasons.

First, despite the State's attempts to shift the emphasis of its case from specific alleged misrepresentations to a more nebulous "scheme liability" theory, the Complaint's conclusory allegations of a "longstanding fraudulent scheme" that "Quiros masterminded" fall far short of satisfying the Rule 9(b) standard for pleading fraud. Indeed, all of the reasonably specific allegations of fraud in the Complaint—as well as those raised in the State's Opposition—come back to the purported misrepresentations contained in the limited partnership PPMs, which cannot sustain claims of securities fraud against Ariel Quiros.

Second, though the State asserts that it has adequately pleaded fraud "in connection" with securities transactions, even under the most relaxed interpretation of the nexus required between fraud and the securities transaction, the State must allege fraudulent conduct that coincided with the purchase or sale of a security. The State's allegations of post-sale misuse of funds simply do not make out fraud in connection with securities transactions.

Third, the State's reliance on a "control person" theory of liability in an effort to shore up its case fails, because VUSA only makes control person liability available in suits between private parties—not in enforcement actions by the State. Moreover, even if the State could pursue a control person theory of liability, it has not alleged the primary violation necessary to find Ariel Quiros liable as a control person.

The State's argument—against the weight of authority—that it should be able to pursue an enforcement action under the VCPA for alleged securities fraud is also misguided. The State seizes on an isolated reference to "securities" in an unrelated provision of the VCPA and from there would have the Court leap to the conclusion that the Legislature must have intended to give

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the Attorney General authority to bring consumer protection claims for securities fraud. To the contrary, there is nothing to suggest that the provision of the VCPA at issue here, 9 V.S.A. § 2453, authorizes VCPA enforcement actions for securities fraud. Instead, the Legislature's express instruction that § 2453 be construed consistently with the FTCA (which has been held not to govern securities) strongly indicates that the Legislature did not intend to regulate securities transactions under § 2453.

Finally, the State's arguments that its Phase I Limited Partnership claims are timely must be rejected. The discovery rule does not apply to claims of securities fraud, and the transactions at issue occurred well outside the statute of limitations.

A. The State Has Not Pleaded Viable "Scheme Liability" Securities Claims.

Defendant Quiros does not dispute that VUSA's anti-fraud provision reaches beyond misrepresentations and omissions, extending to fraudulent schemes, practices, and courses of business. *See* 9 V.S.A. § 5501(1), (3). However, beyond a passing citation to these scheme liability provisions and a few broad-brush allegations, the Complaint contains no *specific* VUSA claims based on an overall fraudulent scheme. Rather, the State rests its case on alleged misrepresentations in the limited partnership PPMs. Because the State has failed to plead viable claims for scheme liability with the requisite particularity, its belated appeal to § 5501(1) and § 5501(3) cannot save its VUSA claims from dismissal.

1. The State's Allegations Do Not Satisfy the Pleading Requirements Imposed by V.R.C.P. 9.

Rule 9(b) of the Vermont Rules of Civil Procedure requires that the "circumstances constituting fraud . . . shall be stated with particularity." The State's allegations of scheme liability fail to meet this rigorous standard. The Complaint does broadly allege that Defendants have violated § 5501, and each VUSA Count dutifully recites the language of that provision,

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including its prohibitions on "employ[ing] a device, scheme, or artifice to defraud" and "engag[ing] in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another period." *See, e.g.*, Complaint, Count I ¶ 3. But the particularity rule requires much more than merely "mouthing the statutory language." *Ambraziunas v. Bank of Boulder*, 846 F. Supp. 1459, 1464 (D. Colo. 1994). Beyond vague references to a "longstanding fraudulent scheme" that was purportedly "masterminded" by Quiros, Complaint, ¶ 8, the Complaint does not even specifically allege the nature and function of the purported "fraudulent scheme." *See In re Parmalat Secs. Litig.,* 376 F. Supp. 2d 472, 493 (S.D.N.Y. 2005) (in pleading a fraudulent scheme, "the appropriate level of particularity . . . is that the plaintiffs must specify what deceptive or manipulative acts were performed, which defendants performed them, when the acts were performed, and what effect the scheme had on investors in the securities at issue").

In attempting to make a case for scheme liability, the State points to its allegations that Quiros misappropriated and misused investor funds. It is not clear how such allegations, if true, would establish *fraudulent* conduct, regardless of whether they might establish some other wrong. To qualify as securities fraud, the alleged misconduct must involve some measure of deception in connection with the sale of securities. In *United States v. Finnerty*, 533 F.3d 143 (2d Cir. 2008), for example, the Second Circuit rejected the government's arguments for fraudulent scheme liability based on a stock trader's "interpositioning," a practice the government characterized as stealing from public customers by taking a profit on the spread between the bid price and ask price of customers' orders. The court, affirming acquittal of the defendant, observed that the government had undertaken to prove "no more than garden variety conversion," and thus the alleged acts did not involve the *deception* necessary to qualify as securities fraud. *Id.* at 148-49.

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Tellingly, the State's explanation of why Quiros' alleged misconduct was deceptive leads directly back to its theory of liability for misrepresentations under § 5501(2). The State contends that "Quiros' serial misappropriation and misuse of investor funds . . . constitutes a scheme to defraud, a series of deceptive acts, and/or deceptive course of conduct" because: (1) the limited partnership PPMs contained representations regarding the purposes for which investor funds would be used, (2) Quiros "reviewed" or "reviewed and approved" each PPM, and (3) Quiros' alleged misappropriation or misuse of funds "materially differed" from what was set forth in the PPMs.[1] *See* Opp. at 21-22. This decidedly circular theory of scheme liability does not fly. Scheme liability must "hinge[] on the performance of an inherently deceptive act *that is distinct* from an alleged misstatement." *SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011) (emphasis added). For that reason, in federal securities enforcement cases "courts have routinely rejected the [government's] attempt to bypass the elements necessary to impose 'misstatement' liability . . . by labeling the alleged misconduct a 'scheme' rather than a 'misstatement.'" *Id.* at 343; *see also SEC v. KPMG LLP*, 412 F. Supp. 2d 349, 378 (S.D.N.Y. 2006) (where "the core misconduct alleged is in fact a misstatement, it would be improper to impose primary liability . . . by designating the alleged fraud a 'manipulative device' rather than a 'misstatement'"). In other words, the State cannot overcome the deficiencies in its case for § 5501(2) liability—which is plainly how the VUSA claims have been pleaded—by attempting to dress the same conduct up as a fraudulent scheme.

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[1] The State also alleges that the misuse of funds created a funding gap in certain projects, and that Ariel Quiros arranged for the transfer of funds from other projects to satisfy the shortfall. *See* Opp. at 20; Complaint, ¶¶ 5-6. However, in explaining why this conduct was "inherently deceptive"—such that it could support scheme liability—the State simply falls back on its allegations that the use of funds was contrary to the representations in the PPMs. *See* Opp. at 20-21.

2. The Authorities on Which the State Relies Involve Specific Allegations of "Deceptive" Conduct of the Type Absent Here.

Rather than helping the State, the cases it cites in support of its scheme liability actually underscore the fatal deficiencies in the Complaint's pleading of securities fraud. The cited cases all involved specific allegations of deceptive conduct by the defendants at issue that transformed the misconduct alleged in those cases into "fraudulent schemes." *See, e.g.*, *SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014) (scheme involving the fabrication of false invoices to inflate revenue); *SEC v. Lee*, 720 F. Supp. 2d 305, 334 (S.D.N.Y. 2010) (scheme involving fabrication of bid/offer quotes to inflate valuation of options); *SEC v. Simpson Capital Mgmt., Inc.,* 586 F. Supp. 2d 196, 201 (S.D.N.Y. 2008) (late-trading scheme, in which trades were made after market closed using after-market information but fraudulently recorded as occurring before market close). The Complaint here is largely devoid of any comparable, specific allegations of deceptive conduct by Defendant Quiros.[2]

The State attempts to analogize this case to *SEC v. Sullivan,* 68 F. Supp. 3d 1367, 1371 (D. Colo. 2014), a case which involved a Ponzi scheme. The analogy fails. A Ponzi scheme is a "phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors." *United States v. Silvestri,* 409 F.3d 1311, 1317 n. 6 (11th Cir. 2005) (citation and quotation marks omitted). Establishing the existence of a Ponzi scheme requires a showing that "(1) deposits were made by investors, (2) [the defendant] conducted little or no legitimate business operations as represented to investors, (3) [the defendant's] purported business operation produced little or no profits or

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[2] The one isolated exception is the State's allegation Defendant Quiros generated false invoices for Jay Construction Management, Inc., in connection with the AnC Bio Limited Partnership. *See* Amended Complaint, ¶ 158. As this allegation concerns only the last of the limited partnerships at issue, the State could not possibly claim that it transforms all of the preceding investments into a fraudulent scheme. Moreover, the allegation relates to the manner in which the investment proceeds were allegedly misappropriated after the sale of securities had taken place, and thus, as discussed further below, does not constitute deception "in connection" with the sale of securities.

earnings, and (4) source of payments to investors was cash infused by new investors." *SEC v. St. Anselm Expl. Co.*, 936 F. Supp. 2d 1281, 1294 (D. Colo. 2013) (citation and quotation marks omitted) (rejecting SEC's argument that the defendant corporation was engaged in a Ponzi scheme where, though the defendant used funds from new investors to service debt on preexisting notes, it had legitimate business operations).

Sullivan presented the archetypal Ponzi scheme, with the defendants using new investments in an insurance premium financing operation to pay redemptions and interest to prior investors. The facts here do not fit that mold. The Jay Peak projects were not "phony," as it is undisputed that five out of seven were constructed to completion, nor is there any allegation that investor funds were used to pay income or redemptions to prior investors. Rather, these were real, substantive projects, which is the critical factor: it is the lack of substance that makes the Ponzi-type investment "inherently deceptive"—separate and apart from any misrepresentations made in connection with them—and thus supports a finding of scheme liability. *See Sullivan*, 687 F. Supp. 3d at 1378; *see also id.* (acknowledging that where the misconduct alleged is a misrepresentation or omission as to the "real terms" of an investment in a legitimate business operation, liability lies, if at all, only under the prohibition on material misstatements or omissions). Moreover, *Sullivan*, like the other authorities cited by the State, also involved specific deceptive acts that supported a finding of scheme liability, including soliciting additional payments from existing investors, meeting with and assuring concerned investors that their money was being used legitimately, and generating false quarterly investment reports to send to investors.

No more persuasive is the State's citation to *SEC v. China N.E. Petroleum Holdings Ltd.*, 27 F. Supp. 3d 379 (S.D.N.Y. 2014), a case premised chiefly on liability for misrepresentations

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and omissions. There, the defendant corporation made two public offerings of stock, accompanied by disclosures indicating that the proceeds would be used for funding the corporation's future business expansion plan and general working capital purposes, among other things. *Id.* at 384-85. In a short period surrounding these offerings, substantial and undisclosed transfers of funds occurred from the corporation's U.S. bank account to certain corporate insiders. *Id.* at 385. On these facts, the court found that the SEC could state claims under both misrepresentation and scheme liability theories of fraud. However, the court emphasized that "the core misconduct alleged by the SEC [was] that defendants raised money under false pretenses and then channeled the proceeds to corporate insiders"; the sine qua non of the fraudulent "scheme" were the alleged misrepresentations and omissions, without which "the plan could not have succeeded."[3] *Id.* at 392. In other words, the misrepresentations constituted the central deceptive act and were the lynchpin of the SEC's scheme liability theory.

The key difference between this case and *China N.E.* is that the complaint in *China N.E.* contained allegations sufficient to state a viable claim for fraud based on misrepresentations and omissions. Both of the individual defendants (the CEO/Chairman and Vice President of Finance/Secretary of the defendant corporation) were alleged to have been directly involved and responsible for the representations at issue: one signed the disclosures, while the other assisted in drafting and reviewing the securities registration statement and was listed as the primary contact person on the press releases that announced the public offerings. *Id.* at 392. Here, the State alleges no such direct involvement by Ariel Quiros in the preparation of the PPMs. The SEC also specifically alleged in *China N.E.* that funds were raised from investors "with the intent of

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[3] The court's discussion of scheme liability, which was very cursory, did not explicitly identify any deceptive act other than the supposed "scheme" of raising money under false pretenses, which places *China N.E.* in tension with the line of authority providing that misrepresentation claims cannot simply be repackaged as scheme liability claims. *See, e.g.*, *Kelly*, 817 F. Supp. 2d at 344.

diverting those funds to corporate insiders without a business justification." *Id.* at 386. Again, as discussed in Defendant's Motion to Dismiss (as well as further below), the State has not alleged any intent by Ariel Quiros to misuse funds at the time the PPMs were issued. Therefore, the appropriate analog for this case is not *China N.E.*—at bottom, a case where the SEC piggy-backed scheme liability on a strong misrepresentation claim—but rather *Kelly*, where, as the State attempts here, the SEC unsuccessfully tried to use scheme liability to get around the deficiencies in its misrepresentation claim. *See Kelly,* 817 F. Supp. 2d at 344.

3. The State Fails to Allege Conduct "in Connection with" Securities Sales.

The State also fails to make a cogent argument that any of the conduct alleged to constitute a "fraudulent scheme" occurred "in connection with" the sale of securities, as required to state a claim under § 5501. The State correctly notes that federal courts have described the "in connection with" requirement broadly, such that it will be satisfied if "a deceptive practice 'touch[es]' a securities transaction" or "the fraud and the purchase or sale of a security . . . coincide." *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1069 (2014) (citations omitted). However, as the Supreme Court has observed, cases finding the requisite "connection" uniformly have "concerned a false statement (or the like) that was 'material' to another individual's decision to 'purchase or s[ell]' a . . . 'security.'" *Id.* (citation omitted). There must be a direct connection between an allegedly fraudulent practice and the sale of a security, such that the fraud materially impacts the transaction.

SEC v. Zandford, 535 U.S. 813 (2002), cited by the State, is illustrative. There, a securities broker accepted funds from an elderly client, promising to "conservatively invest" them, and over the course of four years sold all of the client's securities and transferred the proceeds to himself. The Supreme Court held that this course of conduct constituted a fraudulent

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scheme "in connection with" the sale of securities because the fraud—sales without authorization by or disclosure to the client—coincided directly with the sales of securities. *Id.* at 820-21. Thus, for instance, to liquidate the client's mutual fund holdings, the defendant "initiated [the] transactions by writing a check to himself from that account, knowing that redeeming the check would require the sale of securities." *Id.* at 821. In its analysis of whether the fraud occurred in connection with the sale of securities, the Court expressly distinguished the case from one in which, "*after* a lawful transaction had been consummated, a broker decided to steal the proceeds and did so." *Id.* at 820 (emphasis added); *see also id.* at 825 n.4 (similarly noting that "if a broker embezzles cash from a client's account . . . , then the fraud would not have the requisite connection to a purchase or sale of securities").

Setting aside the State's claims based on alleged misrepresentations in the PPMs—which fail for reasons addressed elsewhere—there is no credible allegation here of a deceptive or fraudulent practice that directly coincided with the sale of securities. As discussed above, the State's allegations do not make out a Ponzi scheme, where the securities themselves are so illusory as to be "inherently deceptive." Rather, what the State alleges is (1) the sale of partnership interests in actual projects and (2) misuse and misappropriation of investment funds that was distinct from and occurred after those sales. These allegations, if true, describe precisely the situation that *Zandford* indicated would *not* qualify as fraud "in connection with" the sale of securities. *Id.* For that reason, the Complaint fails to allege actionable fraud in connection with the sale of securities.

B. Defendant Quiros Cannot Be Held Liable for Misrepresentations Under a "Control Person" Theory of Securities Liability.

In an implicit acknowledgment that the Supreme Court's *Janus* decision precludes direct liability for Ariel Quiros for any representations in the limited partnership PPMs, the State now

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presses a theory of indirect, "control person" liability.[4] Under this theory, a defendant who has not directly violated securities laws may nonetheless be held liable where he or she exercised control over another individual or entity that committed a primary violation of such laws. The argument fails here. Control person liability is a creature of statute, and, by statute, it is available only in private suits. There is thus no basis in VUSA for the State to pursue an enforcement action on a theory of control person liability. Moreover, to prevail on a control person claim, a plaintiff must establish a primary violation of securities laws; the Complaint does not sufficiently plead such a violation.

1. Control Person Liability Is Unavailable in an Enforcement Suit.

The State's control person arguments spring from 9 V.S.A. § 5509, which is the provision of VUSA governing civil liability in private suits. Section 5509(g) provides, in relevant part, that a "person that directly controls a person liable under subsections (b) through (f) *of this section*" will be "liable jointly and severally with and to the same extent as persons liable under subsections (b) through (f) *of this section*." 9 V.S.A. § 5509(g)(1) (emphasis added). The referenced subsections relate to private securities litigation, detailing the various circumstances in which a person may be held liable in a civil action brought by another party to a security-related transaction or in connection with investment advice. An entirely separate statute—9 V.S.A. § 5603—governs liability in civil enforcement actions by the State. Notably, it contains no parallel provision for control person liability. Because control person liability is created solely by statute and "does not exist under the common law," the State "cannot extend control person liability beyond the circumstances provided for in [VUSA]." *Berglund v. Cynosure, Inc.*,

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[4] Notably, there is no reference to the "control person" provision of VUSA in the Complaint, nor any disclosure that the State's claims against Ariel Quiros were based on such a theory.

502 F. Supp. 2d 949, 955 (D. Minn. 2007). The theory is thus unavailable in an enforcement suit.[5]

The federal securities authorities cited by the State offer no support for its position. Control person liability under federal law, as under VUSA, is a matter of statute. The State points to two federal statutes that it contends are parallel to and should guide interpretation of VUSA. *See* Opp. at 23 and n.8. The first, 15 U.S.C. § 78t, is the statute generally relied upon by SEC in enforcement suits involving control person claims—and, unsurprisingly, that statute *expressly* extends the control person theory to actions brought by the Commission under its enforcement authority. *See* 15 U.S.C. § 78t(a) (providing for control person liability "to any person to whom [the] controlled person is liable (*including to the Commission in any action brought under paragraph (1) or (3) of section 78u(d) of this title*)" (emphasis added)). The second, 15 U.S.C. § 77o(a), provides for control person liability only in certain private actions, and, accordingly, has been held inapplicable in SEC enforcement suits. *See SEC v. Stringer*, No. CIV. 02-1341-ST, 2003 WL 23538011, at *14 (D. Or. Sept. 3, 2003) (noting that § 77o(a) "is clearly limited to suits by private parties because it only pertains to the liability of persons who control 'any person liable under sections 77k or 77l,'" both of which "are intended to benefit defrauded investors rather than to provide an enforcement mechanism to the SEC"). Accordingly, the federal authorities confirm that control person liability exists only where the statutes expressly provide for it—and, again, VUSA contains no provision for control person liability in enforcement actions.

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[5] In fact, in another portion of its Opposition, the State effectively concedes that the provisions of § 5509 do not apply to enforcement actions. *See* Opp. at 41, n.24 (stating that the statute of limitations set forth in § 5509 only applies to "private rights of action in securities, not public actions").

2. The State Has Not Pleaded a Viable Primary Securities Fraud Violation Based on Misrepresentations or Omissions.

Even were control person liability available in enforcement suits, in order to proceed on such a theory the State would first be required to establish a primary violation, i.e., that a person or entity "controlled" by Ariel Quiros violated the anti-fraud provision of VUSA.[6] *See Dekalb County Pension Fund v. Transocean Ltd.,* 817 F.3d 393, 400 (2d Cir. 2016) ("To state a claim of control person liability . . . a plaintiff must show . . . a primary violation by the controlled person." (quotation marks and citation omitted)); *Lustgraaf v. Behrens*, 619 F.3d 867, 874 (8th Cir. 2010) ("The plain language of the control-person statute dictates that, absent a primary violation, a claim for control-person liability must fail."). The State has failed to allege any colorable primary violations of § 5501(2). Rather, as explained in Defendant's Motion, the Complaint focuses on alleged misconduct that post-dated the sale of partnership interests, and does not allege fraudulent representations or omissions that "coincide[d]" with—and thus occurred "in connection" with—the sale of securities. *SEC v. Zandford*, 535 U.S. 813, 822 (2002).

The State argues that the representations in the PPMs at issue were misleading "because Quiros' misappropriation and misuse of investor funds 'materially differed' from the represented uses and restrictions." Opp. at 29. That is no more than a post-hoc attempt to read falsity into the PPMs based on subsequent events: a forward-looking promise does not retroactively become false merely because events do not transpire as promised. As Defendant previously noted, "broken promises referring merely to the future do not afford the basis of actionable fraud"

[6] The State also argues—albeit in a footnote—that Ariel Quiros could be held liable as a primary violator of Section 5501(2) because he allegedly "had knowledge of the fraud and assisted in its perpetration." Opp. at 28, n. 16. The authority upon which the State relies, *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450 (2d Cir. 1996), was subsequently characterized by the Second Circuit as a case concerning "control person" liability. *See Wright v. Ernst & Young LLP,* 152 F.3d 169, 176 (2d Cir. 1998) (rejecting plaintiff's argument that liability could be imposed on defendants alleged to have "substantially participated" in the fraud, i.e., to have "had knowledge of the fraud and assisted in its perpetration."). *First Jersey* also came well before the Supreme Court decided *Janus*.

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unless there is proof of a *contemporaneous* intent not to perform. *Comstock v. Shannon*, 116 Vt. 245, 250, 73 A.2d 111, 113 (1950).

The State disagrees, contending that there is no need to allege that Defendant Quiros lacked the present intention of using funds as specified in the PPMs at the time they were issued to make those representations actionable under VUSA. *See* Opp. at 32 n.19. The State offers two arguments in support of its position—and both fail. The State first suggests that the showing of a contemporaneous intent not to perform is a requirement only of the common law and does not apply to VUSA. That is incorrect. Under federal law, on which VUSA's anti-fraud provision is modeled, a securities fraud claim may be based on broken promises only where there is proof that the promisor had no present intention of abiding by the promise. *See Thompson ex rel. Thorp Family Charitable Remainder Unitrust v. Federico*, 324 F. Supp. 2d 1152, 1162-63 (D. Or. 2004). There is a logical reason for this: a promise, unlike a statement of present fact, can only be said to be "false" if the promisor never intends to comply. The same analysis undoubtedly applies under VUSA. *See Shafi v. Weidinger*, No. 09-10454, 2011 WL 1297242, at *10 (E.D. Mich. Apr. 5, 2011) (dismissing Uniform Securities Act claim where plaintiff offered insufficient evidence that defendants never intended to perform promises or made them in bad faith).

The State next argues that VUSA does not require proof of intent or culpability to establish liability for fraud in an enforcement action, *see* 9 V.S.A. § 5603, and thus there is no need to allege intent not to perform. The second proposition does not follow from the first. It is true that scienter—the intent to deceive—is not generally required to prove a violation of the Uniform Securities Act in a state enforcement action. *See, e.g.*, *Sec. of State v. Tretiak*, 117, Nev. 299, 22 P.3d 1134 (2001). What is at issue here, however, is not proof of scienter, but

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rather proof of a false statement: liability for misrepresentation under VUSA requires "an untrue statement of material fact," 9 V.S.A. § 5501(2), and, again, a promise is only an "untrue statement" if the person making it does not actually intend to carry it out. *Cf. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1325-27 (2015) (a statement of opinion is only an "untrue statement of material fact" if the speaker does not hold the belief professed).

Despite arguing that it is not required, the State suggests that an intent not to perform could possibly be inferred from the alleged misuse of funds. *See* Opp. at 32 n.19. The State has nowhere alleged in the Complaint such an intent. Indeed, it is telling that, despite having conducted an extensive investigation alongside the SEC into the investments underlying this suit, the State has stopped short of any allegation that the Defendants lacked the intention to abide by the representations made in the PPMs from the outset. The reason for this omission is simple: the facts do not support such an inference. Had Defendants conducted some minor development to maintain the façade of a legitimate investment and then fled the country with the investment proceeds, the inference that they did not intend to make good on their promises would be readily available. Here, however, the State concedes that Defendants developed *to completion* five of the seven projects at issue. These are not the actions of individuals and entities that lacked an intention to carry out their promises at the time they were made. The Complaint does not allege actionable misrepresentations, and the "control person" theory of liability thus fails for lack of a primary violation.

3. The State Implicitly Concedes that There Is No Liability for the Alleged Misrepresentations Regarding Phase I.

Backing off from one of its most extreme claims, the State appears to concede in its Opposition that there can be no liability, control person or otherwise, for misrepresentations or

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omissions regarding the Phase I L.P. *See* Opp. at 28 (asserting only that State has alleged facts to impose control person liability "as pled in Counts 2 through 7"). As the State acknowledges, control person liability requires that the "'defendant must not only have actual control over the primary violator, but have actual control over the transaction in question.'" *Id.* at 24 (quoting *In re Alstom SA*, 406 F. Supp. 2d 433, 487 (S.D.N.Y. 2005)). The State admits that the Phase I L.P. was fully subscribed by the time Ariel Quiros purchased Jay Peak, Opp. at 5, and thus any contention that Quiros had "actual control" over the sale of partnership interests—and the representations made in connection therewith—would be baseless.

C. The State's Arguments to Preserve Its VCPA Claims Lack Any Merit.

The State argues, against the weight of authority from states with consumer protection statutes similar to Vermont's, that it may bring enforcement claims under the VCPA for securities fraud, accusing Ariel Quiros of "ignor[ing] the plain language of the VCPA." Opposition 33. The State has it precisely backwards. It is the State's arguments that ignore the plain language of the statute, by paying no heed to the Legislature's instruction to read § 2453 consistently with the FTCA. The State instead focuses on an isolated reference to securities in a provision of the VCPA unrelated to § 2453, inviting the Court to read into the statute a term that is simply not present. In addition, the State cites a handful of inapposite authorities from jurisdictions with different regimes than Vermont's, and floats a tenuous argument based on a savings clause contained in a portion of the VUSA that pertains to private rights of action. All of these arguments fall well short of the mark.

1. An Isolated Reference to "Securities" Does Not Authorize the State to Bring Securities Fraud Enforcement Actions Under the VCPA.

In interpreting statutory text, a court must seek to give effect to the Legislature's intent by "looking to the legislation's plain meaning," and should "not read terms into the statute unless

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necessary to make the statute effective." *Morin v. Essex Optical/The Hartford*, 2005 VT 15, ¶ 7, 178 Vt. 29, 868 A.2d 729. The Legislature left no ambiguity as to its intent in enacting § 2453: it explicitly directed courts to construe the statute's scope and prohibitions consistent with the FTCA and federal authority interpreting that Act. *See* 9 V.S.A. § 2543(b); *see also State v. Int'l Collections Serv., Inc.*, 156 Vt. 540, 542, 594 A.2d 426, 428 (1991) (courts "must look" to the FTCA in interpreting § 2453); *cf.* 9 V.S.A. § 2453(c) (instructing the Attorney General to ensure that any rules and regulations promulgated to carry out the purposes of the VCPA "*shall not be inconsistent* with the rules, regulations and decisions of the Federal Trade Commission and the federal courts interpreting the [FTCA]" (emphasis added)). As explained in Defendant Quiros' Motion to Dismiss, the FTCA has long been interpreted not to apply to securities. *See Stephenson v. Paine, Webber, Jackson & Curtis, Inc.*, 839 F.2d 1095, 1101 (5th Cir. 1988). In the majority of jurisdictions with consumer protection statutes such as Vermont's, modeled on the FTCA and requiring consistent interpretation, courts have held that the exclusion of securities from the FTCA's scope precludes application of state consumer protection laws to securities transactions. *See Carter v. Gugliuzzi*, 168 Vt. 48, 52, 716 A.2d 17, 21 (1998) (courts should look to the case law of other jurisdictions with consumer protection statutes analogous to Vermont's in interpreting the VCPA).

While paying lip service to the principle of plain language interpretation, the State contorts the language of the statute to attempt to read § 2453 to apply to securities transactions. The State notes that the VCPA's broad definition of "'goods' or 'services'" includes the term "securities." *See* 9 V.S.A. § 2451a(b). However, the State makes an unjustifiable jump in logic, unsupported by any statutory text, in asserting that the definition of goods and services defines the scope of § 2453. It does not. Section 2453(a) sets forth a prohibition, parallel to and to be interpreted consistently with the FTCA, on "[u]nfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." There is no reference in § 2453 to goods or services. Likewise, the statute that authorizes the State to bring civil enforcement actions for violations of § 2453 does not include reference to goods and services. *See* 9 V.S.A. § 2458(a).

The function of the phrase "goods or services" in the VCPA is to impose a standing requirement for private suits: the statute offers a cause of action only for "consumers"—defined as those who purchase, lease, or contract for "goods or services"—who sustain damages or contract for goods or services in reliance on or as a result of "false or fraudulent representations or practices prohibited by section 2453." 9 V.S.A. §§ 2451a(a), 2461. This standing requirement has no bearing on the present action. Indeed, the Vermont Supreme Court has made clear on several occasions that the interpretation and application of § 2453 is distinct from interpretation of the provisions governing standing for private suits. In *State v. International Collection Service, Inc.*, 156 Vt. 540, 594 A.2d 426 (1991), the Court held, based on the plain text of the statute, that the scope of the private right of action for "consumers" neither defines § 2453 nor controls the scope of the State's enforcement authority. *Id.*, 156 Vt. at 541-44, 594 A.2d at 428-29 (holding that § 2461's limitation of private suits to "consumers" did not limit State's authority to enforce § 2453). Conversely, the Court held in *Elkins v. Microsoft Corp.*, 174 Vt. 328, 336, 817 A.2d 9, 17 (2002) that § 2453(b)—the provision requiring that § 2453(a) be interpreted consistent with the FTCA—"does not apply to the [VCPA] as a whole but only to § 2453(a), which sets out the practices prohibited under the Act." *See also id.* (noting that "§ 2453(b) is not aimed at defining who can sue under the VCFA, but rather what conduct constitutes a violation of the Act"). In sum, the Court has treated § 2453 and § 2461 as separate

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statutory provisions and has rejected prior efforts to construe one by reference to the other—which is precisely what the State seeks to do here.

The State points out that the Attorney General's enforcement authority has generally been construed, based on the language of the statute, to be broader than the private right of action under the VCPA. *See Knutsen v. Dion*, 2013 VT 106, ¶ 19, 195 Vt. 512, 90 A.3d 866 (interpreting statute and finding "no indication that the Legislature intended that a private action be available where the attorney general can not pursue a public action"); Opp. at 34 n.21. That is true. However, to the extent the State implies that there must be civil enforcement authority under the VCPA for securities transactions merely because there may be a private right of action for such claims, its argument fails to hold water. To start with, it is unclear—and the Court need not resolve here—whether there is in fact a private right of action under the VCPA for securities transactions. The term "securities" was added to the definition of "'goods' or services'" without fanfare in a 1985 act relating to regulation of companies that sell bottled gas. *See* P.A. No. 34, § (1985 Vt., Bien. Sess.). There is no indication in the Act as to why the Legislature added the term, nor has any court ever relied on § 2451a(b) to apply the VCPA to securities transactions in a private suit. A court might, or might not, conclude that the Legislature intended to alter the substantive scope of the private right of action under § 2461 by amending a definition related to standing. However, it would be a monumental stretch to surmise that this amendment to the standing requirements for private claims—whatever its substantive effect on such claims—was intended by the Legislature to alter an entirely distinct statutory provision, § 2453(a), which prohibits certain acts and provides the basis for the State's enforcement authority. In these circumstances, the principle that the private right of action under the VCPA is no more expansive than the Attorney General's enforcement authority might militate against recognizing a private

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VCPA action for securities transactions, but it certainly does not justify *expanding* the scope of enforcement authority beyond what is contemplated by the plain language of the statute.[7]

The State also attempts to read the phrase "goods or services" into the text of § 2453(a) by suggesting that an unfair or deceptive act occurs "in commerce" (as that term is used in the statute) when it involves a transaction in "goods or services." *See* Opp. at 34. The State's argument rests on *Foti Fuels, Inc. v. Kurrle Corp.*, 2013 VT 111, ¶ 21, 195 Vt. 524, 90 A.3d 885, which interpreted the phrase "in commerce" to mean "in the consumer marketplace" and having "a potential harmful effect on the consuming public." The State contends that the Court's reference to "consumer" in that decision necessarily imports the VCPA's statutory definition of "consumer" into the meaning of "in commerce," which in turn incorporates the term "goods or services." The argument fails under its own weight. There is no indication in *Foti Fuels* that the Court was using "consumer" in so specific a manner; rather, the opinion suggests that the reference to a "consumer marketplace" more generally referred to "the context of an ongoing business in which the defendant holds himself out to the public." *Id.* (citation and quotation marks omitted). More to the point, the Court has previously interpreted "in commerce" to be distinct from the definition of "goods and services." *See Wilder v. Aetna Life & Cas. Ins. Co.*, 140 Vt. 16, 18, 433 A.2d 309, 310 (1981) (holding that the business of insurance "is clearly within commerce" but was not actionable under § 2461 because it was <u>not</u> a "good" or "service" as defined in the statute). There is no basis in the statute or case law to interpret the scope of § 2453(a) by reference to the definition of "goods" and "services" in § 2451a.

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[7] Moreover, there is no reason that the Legislature could not give private litigants different or additional rights than the State under the VCPA if it so desired. The principle that the State's enforcement authority is broader than the private right of action is based on a reading of the statutory text, *see Knutsen*, 2013 VT 106, ¶ 19; it is not a free-standing rule.

2. The Authority from Jurisdictions with Comparable Laws Does Not Support Interpreting the VCPA to Extend to Securities in this Case.

As described in Defendant's Motion, the great majority of courts in jurisdictions with statutes analogous to Vermont's have held that these laws do *not* cover transactions involving securities. *See* Motion to Dismiss at 14-15. The State cites a handful of contrary authorities from other jurisdictions in which consumer protection or unfair trade practices laws have been applied to securities claims, but the laws and decisions of those states—which include Minnesota, Pennsylvania, Massachusetts, Illinois, and Arizona—differ in critical respects. Among other things, four out of five of those jurisdictions cited have considerably weaker or no provisions requiring consistency with the FTCA, and in the fifth, the state legislature expressly amended the prohibited acts statute to apply to securities. These authorities therefore offer negligible support for the State's position.

The first of the jurisdictions, Minnesota, has an entirely distinct statutory scheme than its sister states. Among other things, its consumer protection and unfair competition laws contain no provision comparable to Vermont's directing courts to interpret the law consistently with the FTCA. *See* Minn. Stat. §§ 325D.13 (Unlawful Trade Practices Act), 325D.44 (Deceptive Trade Practices Act), 325F.69 (Prevention of Consumer Fraud Act). Authority interpreting Minnesota's laws is thus of little aid to interpretation of the VCPA. The Minnesota authority cited by the State, *Blue Cross & Blue Shield of Minn. v. Wells Fargo Bank, N.A.*, No. CIV. 11-2529 DWF/JJG, 2012 WL 1343147 (D. Minn. Apr. 18, 2012) provides a case in point: there, the court's determination that the state's consumer protection law applied to the securities at issue—a determination made in passing in a footnote—rested on the definition of the term "merchandise," which, as the court noted, has been interpreted to include intangibles such as securities. *See id.* at *6 n.5. The definition of "merchandise" was important because the

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consumer protection law prohibits various fraudulent acts "in connection with the sale of any merchandise." Minn. Stat. § 325F.69. The VCPA does not contain provisions parallel to these.

Pennsylvania's consumer protection law differs from Vermont's along similar lines. While Pennsylvania's courts have looked to the FTCA for guidance in construing their consumer protection law, *see Commonwealth v. Monumental Props., Inc.*, 459 Pa. 450, 329 A.2d 812 (1974), the law itself contains no reference to the FTCA nor any express direction to interpret the law consistently with federal authority. *See* 73 P.S. §§ 201-1 et seq. Thus, while the State is correct that some federal district courts have held that Pennsylvania's consumer protection law may extend to securities, those courts have not needed to give the same weight to federal precedent as in other jurisdictions. *Compare Denison v. Kelly*, 759 F. Supp. 199, 205 (M.D. Pa. 1991) (noting practice of looking to the FTCA for guidance, but declining to give it significant weight in interpreting Pennsylvania's law), *with Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388, 390-91 (9th Cir. 1988) (citing the "provision of the statute requiring that it be construed in accordance with the judicial interpretation of similar federal antitrust statutes" as a "compelling argument" in favor of excluding securities from coverage). Moreover, the leading Pennsylvania authority cited by the State, *Denison v. Kelly*, only questionably remains valid law, and certainly no longer stands for the broad proposition for which the State cites it: in *Algrant v. Evergreen Valley Nurseries, Ltd. P'ship*, 126 F.3d 178, 187 (3d Cir. 1997), the Third Circuit distinguished *Denison* as a case involving fraudulent conduct in the "services" provided by a brokerage house to the plaintiff. The Third Circuit went on to hold, based in part on interpretation of the FTCA, that Pennsylvania's consumer protection law does not cover fraud in connection with securities themselves.[8] *See id.* (noting as well that "allowing plaintiffs to obtain

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[8] The Court's decision also relied on interpretation of whether an investment security was a "good" within the meaning of statute, ultimately holding that it was not. That term has a distinct function in Pennsylvania:

remedies under both the UTP/CPL and the Securities Act is not consistent with coherent legislative intent."). Notably, in *Algrant*, as here, the underlying allegations of fraud concerned misrepresentations and omissions in the private placement memoranda issued in connection with the sale of limited partnership interests.

Massachusetts, in contrast to Minnesota and Pennsylvania, previously had a consumer protection statute substantially identical to Vermont's in the relevant respects, but that law has since changed. The prior statute had been construed not to apply to securities, largely on the basis that differences in the scope and nature of relief under the state's uniform securities act made it unlikely that the legislature intended to give purchasers of securities buyers a parallel right of action under the consumer protection law. *See Cabot Corp. v. Baddour,* 394 Mass. 720, 477 N.E.2d 399 (1985). The Massachusetts legislature subsequently amended the law to expressly define the terms "trade" or "commerce," as used in the definition of prohibited acts, to include the sale of securities as defined in the state's uniform securities act. *See* 93A M.G.L.A. §§ 1(b), 2(a). As discussed above, Vermont's prohibited act statute, under which the State brings its claims, has not been amended in a similar fashion.[9]

Several federal district courts in Illinois have also construed that state's deceptive practices act to extend to securities—though, to be clear, Illinois' courts have not directly

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Pennsylvania's statute, which is very different from Vermont's, defines "unfair methods of competition" and "unfair or deceptive acts or practices" to include a long, enumerated list of fraudulent or unfair practices in connection with "goods" and "services." *See* 73 P.S. § 202-2(4). Thus, the definition of a "good" is directly controlling as to the scope of Pennsylvania's statute.

[9] Though the State attempts to analogize Massachusetts' amendment of its consumer protection law to Vermont's addition of "securities" to the definition of "goods" and "services" in § 2451a, the comparison is inapt. There can be no question as to the intent and scope of the Massachusetts legislature's amendment of that state's consumer protection law: the amendment was made in reaction to a decision holding that the consumer protection law did not apply to securities; it explicitly referenced the definition of securities in Massachusetts' uniform securities act; and it directly altered the scope of the prohibited acts statute. The amendment to § 2451a, in contrast, impacted only the standing requirements for the <u>private</u> right of action, and there is no indication that the legislature intended to expand the scope of the acts prohibited under the VCPA to include securities violations.

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resolved the matter,[10] and at least one federal court has held that securities do not fall within the statute's ambit. *See Coron, Inc. v. Am. Heritage Sav. & Loan Ass'n.,* No. 85 C 6380, 1986 WL 2072, at *4 (N.D. Ill. Feb. 3, 1986). In any case, those decisions are unpersuasive here. The courts' holdings all rest on interpretation of the term "merchandise," a term not found in the operative provisions of Vermont's statute, and the cursory rationale offered by these courts omits any discussion of the treatment of securities under the FTCA. *See Horizon Fed. Sav. Bank v. Selden Fox & Assocs.*, No. 85 C 9506, 1988 WL 70473, at *6-7 (N.D. Ill. June 30, 1988); *Preston v. Kruezer*, 641 F. Supp. 1163, 1168 (N.D. Ill. 1986); *Onesti v. Thomson McKinnon Secs., Inc.*, 619 F. Supp. 1262, 1267 (N.D. Ill. 1985). That lack of discussion of the FTCA is likely due to the fact that Illinois' statutory language on consistency with federal law is considerably weaker than Vermont's, merely calling for "consideration [to] be given" to interpretation of the FTCA. *Compare* 815 ILCS 505/2 ("In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act") *with* 9 V.S.A. § 2453(b) ("It is the intent of the Legislature that in construing subsection (a) of this section, the courts of this State *will be guided* by construction of [the FTCA]" (emphasis added)) *and* § 2453(c) (providing that rules and regulations under the VCPA "shall not be inconsistent" with federal authority interpreting the FTCA). Moreover, Illinois' deceptive practices act has historically been given a broader interpretation than Vermont's, reaching "highly regulated fields such as commodities and insurance." *Horizon*, 1988 WL 70473, at *7. *Compare Wilder v. Aetna Life & Cas. Ins.*

[10] A 1974 state court decision held that the sale of marketing franchises constituted the sale of "intangible" merchandise within the meaning of the law, and noted in dicta that "intangible" had been defined in the estate law context "as property which has no intrinsic value but which is representative or evidence of value, such as certificates of stocks, bonds, promissory notes and franchises." *People ex rel. Scott v. Cardet Int'l, Inc.*, 321 N.E.2d 386, 390 (Ill. Ct. App. 1974). This case was relied on by the federal district courts to conclude that Illinois' deceptive practices law applied to securities.

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Co., 140 Vt. 16, 18, 433 A.2d 309, 310 (1981) (holding that the VCPA does not reach insurance).

Finally, Arizona's consumer fraud act—like Illinois'—places considerably less emphasis on consistency with federal law than Vermont's, providing only that courts construing the statute's prohibited acts provision "may use as a guide" interpretations of the FTCA. *See* A.R.S. § 44-1522(C). And, as in Illinois, the opinion in the lead case holding that Arizona's consumer fraud act extends to securities, *State ex rel. Corbin v. Pickrell*, 667 P.2d 1304, 1307 (Ariz. 1983), engaged in no discussion of the FTCA. Rather, the decision was based solely on circumstances unique to the development of the law in Arizona: shortly after a prior appeals court decision holding that the consumer protection law did *not* apply to securities, the state legislature amended the law to add a provision stating that the "provisions of this article are in addition to all other causes of action, remedies and penalties available to this state." *See* A.R.S. § 44-1533(A). The court in *Pickrell* concluded that the implicit intent of this amendment was to "reverse" the appeals court decision and provide an avenue for securities claims under the consumer fraud act. *Pickrell*, 667 P.2d at 1307. There has been no analogous pattern of events in Vermont, nor, for the matter, does the VCPA include a savings clause comparable to the one that animated *Pickrell*.[11] Hence this authority, like the others above, provides no support to the State's position. *See Spinner Corp.*, 849 F.2d at 393 n.6 (distinguishing *Pickrell* on similar grounds).

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[11] Though the State contends that the amendment of Arizona's statute to introduce the savings clause "was one of several factors considered" by the *Pickrell* court in concluding that the statute applied to securities, Opp. at 37 n.23, the decision discloses no other discernible basis for the court's holding.

3. VUSA's Savings Clause Does Not Subject Securities to Regulation Under the VCPA.

In its final argument in support of its VCPA claims, the State contends that a savings clause in VUSA, found at 9 V.S.A. § 5509(m), refutes Ariel Quiros' arguments that the Vermont legislature did not intend to subject securities transactions to overlapping regulation under two statutes and by two separate state officials. *See* Opp. at 38. Not so. The savings clause the State cites falls within the statute governing *private* securities actions, *see* 9 V.S.A. § 5509, and thus cannot reasonably be read as an expression of legislative intent to subject securities transactions to regulation and enforcement by separate government officials under two separate regulatory systems. Rather, this savings provision has generally been interpreted—as the case law cited by the State illustrates—as intended to permit private litigants to join common law fraud claims with actions under the Uniform Securities Act. *See Cabot Corp. v. Baddour*, 394 Mass. 720, 726, 477 N.E.2d 399, 402 (1985) (collecting cases). The savings provision has been present in the Uniform Securities Act since 1956, *see* 9 V.S.A. § 5509, Uniform Law Comments n. 16, and most if not all of the jurisdictions with consumer protection statutes that have been held not to apply to securities also have securities laws with a savings clause substantially identical to Vermont's. *See, e.g.*, H.R.S.A. § 485A-509(m) (Hawaii); L.R.S.A. § 714(E) (Louisiana); T.C.A. § 48-1-122(j) (Tennessee); C.G.S.A. § 36b-29(j) (Connecticut); N.C.G.S.A. § 78A-56(j) (North Carolina). Thus the presence of § 5509(m) does not in any way diminish the arguments for interpreting the State's enforcement authority under the VCPA to exclude securities transactions.

D. The State's Claims with Respect to Phase I Are Manifestly Untimely and Cannot Be Resurrected by the Discovery Rule.

The State continues to press its claims related to the Phase I L.P., notwithstanding the fact that the securities transactions at issue were completed before Ariel Quiros purchased Jay Peak over 8 years ago. Contending that the discovery rule applies, the State suggests that any

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determination of timeliness must await further factual development. Once again, the State is incorrect. The discovery rule does *not* apply to securities-related claims, and thus no further facts are necessary to apply the statute of limitations: the Phase I claims are plainly time-barred on the face of the Complaint.

As the State points out, the discovery rule generally applies in determining the accrual of a claim under 12 V.S.A. § 511. Securities claims, however, are different. Under both federal and state law, private securities claims are subject to a strict statute of repose: claims must be brought by the earlier of two years from discovery of the violation or five years after the violation occurs. *See* 28 U.S.C. § 1658(b); 9 V.S.A. § 5509(j)(2). If this were a private suit, there could be no question that claims based on the Phase I transactions are time-barred.

The State argues, in essence, that it should be subject to a more forgiving standard, entitled to take advantage of the discovery rule under circumstances where private litigants could not do so. The argument holds no water. A similar issue came before the United States Supreme Court in *Gabelli v. Securities & Exchange Commission*, 133 S. Ct. 1216 (2013), where the Court considered whether the discovery rule applied to extend the accrual date for an investment advisor fraud enforcement action by the SEC. The Court held that it did not. It reasoned that the SEC, by virtue of its investigatory mandate and resources, was in a different position than private litigants with respect to discovery of fraud, and less needing of accommodation: "Unlike the private party who has no reason to suspect fraud, the SEC's very purpose is to root it out, and it has many legal tools at hand to aid in that pursuit." *Id.* at 1222. The Court also noted that the penal nature of civil enforcement actions favors stricter adherence to limitations periods. *Id.* at 1223.

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Similarly, Vermont law charges the Department of Financial Regulation with administering VUSA and protecting Vermont consumers from unfair practices with respect to financial services and products. *See* 8 V.S.A. § 10; 9 V.S.A. § 5601. The Commissioner, like the SEC, has many "legal tools at hand" that are unavailable to private litigants: the Commissioner can, without filing suit, conduct a full investigation, subpoena witnesses, request written statements, and require the production of documents. *See* 9 V.S.A. § 5602(a), (b); *see also Gabelli*, 133 S. Ct. at 1222 (noting that SEC's powers include subpoenaing witnesses and requiring books and records to be turned over). In light of its position and powers, the Department "is a far cry from the defrauded victim the discovery rule evolved to protect." *Id.* Discovery-based accrual is thus less necessary for the Department than for the private individual—and, in any event, would run counter to the principle of repose embodied by 9 V.S.A. § 5509(j)(2).

There are also practical impediments to application of a discovery rule in securities fraud enforcement suits. As the Supreme Court noted in *Gabelli*, "[d]etermining when the Government, as opposed to an individual, knew or reasonably should have known of a fraud presents particular challenges for the courts." *Id.* at 1223. Not only are there often multiple agencies and various levels of leadership involved in investigating fraud, making it difficult to determine whose knowledge is controlling, but it is also "unclear whether and how courts should consider agency priorities and resource constraints" in considering whether an agency "reasonably should have known" of a violation. *Id.* Such issues would be particularly confounding in the present suit. Multiple levels of State government had involvement in the EB-5 program at issue, and serious questions have already been raised about when the State became aware of concerns with the limited partnership investments. *See, e.g.*, Ann Galloway,

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Documents Suggest State Ignored Warnings About Jay Peak in 2012, VTDigger, July 25, 2016, available at http://vtdigger.org/2016/07/25/documents-suggest-state-ignored-warnings-about-jay-peak-in-2012/.

Though the State suggests that the discovery rule is a uniform principle applied to all suits that fall under 12 V.S.A. § 511's six-year statute of limitations, that contention is at odds with the historic development of the rule. The discovery rule is not a statutory creation but rather is "judge-made law," *Cavanaugh v. Abbott Labs.*, 145 Vt. 516, 523, 496 A.2d 154, 159 (1985), law which developed specifically in the context of private tort suits. *See id.* (first adopting general discovery rule in context of a drug product liability case); *Lillicrap v. Martin*, 156 Vt. 165, 591 A.2d 41 (1989) (clarifying criteria for discovery rule in a medical malpractice suit); *University of Vt. v. W.R. Grace & Co.*, 152 Vt. 287, 565 A.2d 1354 (1989) (expanding discovery rule to § 511 in product liability action). The Vermont Supreme Court has never extended the discovery rule to an enforcement suit by the State under § 511, as the State seeks here. *Cf. Gabelli*, 133 S. Ct. at 1221 (similarly noting that the U.S. Supreme Court has "never applied the discovery rule in this context, where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement action for civil penalties"). The one enforcement case the State cites, *Agency of Natural Res. v. Towns*, 168 Vt. 449, 724 A.2d 1022 (1998), fell under a different statute of limitations for environmental claims that *expressly* incorporates the discovery rule. *See* 10 V.S.A. § 8015(1) (statute of limitations running "six years from the date the violation is or reasonably should have been discovered").

There is no authority suggesting that the State is permitted to reach well beyond the statute of limitations in a securities enforcement suit, especially where private litigants are

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subject to a strict statute of repose. The State's claims based on the Phase I L.P. are untimely and should be dismissed.

Conclusion

For the reasons set forth above and in his Motion to Dismiss, Defendant Ariel Quiros requests that the Court dismiss the State's Complaint with prejudice.

DATED at Burlington, Vermont, this 6th day of September, 2016.

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